PUBLIC PROSECUTOR v. TAN GONG WAI & ANOR.

[O. Cr. J. (Edgar Joseph Jr. J.) February 7 to 9, 13 to 15, 20 to 24 & 27; March 5 & 14; March 31, 1984]

[Penang – Criminal Trial No. 9 of 1981]

Criminal Law and Procedure – Charge of trafficking in dangerous drug – Raid conducted on information – Accused arrested – Cautioned statements of accused not admitted – Prima facie case – Burden on defence – Evaluation of evidence – Failure to call witness – No reasonable doubt raised – Common intention – Penal Code (Cap. 45), s.34 – Conviction – Sentence – Dangerous Drugs Act, 1952, s. 39B.

Dangerous Drugs – Trafficking – Charge proved beyond reasonable doubt – Death sentence.

In this case the accused were arrested after a police raid following information. The learned trial judge found that there was a *prima facie* case against the accused and called on them for their defence.

Held: (1) the charge had been proved against both accused beyond all reasonable doubt and they were accordingly convicted;

(2) there were no extenuating circumstances in this case and the accused were sentenced to death.

Cases referred to:

(1) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.
(2) *Goh Ah Yew* v. *Public Prosecutor* [1949] M.L.J. 150.
(3) *Reg.* v. *Gallagher* [1974] 1 W.L.R. 1204.
(4) *Public Prosecutor* v. *Lim Kuan Hock* [1967] 2 M.L.J. 114, 115.
(5) *Tay Choo Wah* v. *Public Prosecutor* [1976] 2 M.L.J. 95, 100.
(6) *Chang Liang Sang & Ors.* v. *Public Prosecutor* M.L.J. 231.
(7) *Public Prosecutor* v. *Oo Leng Swee* [1981] 1 M.L.J. 247.
(8) *Ong Ah Chuan* v. *Public Prosecutor* [1981] 1 M.L.J. 64.
(9) *Public Prosecutor* v. *Lim Teik Seng & Ors.* Penang Criminal Trial No. 9 of 1979, unreported.
(10) *Kee Lik Tian* v. *Public Prosecutor* [1984] 1 M.L.J. 306.
(11) *R.* v. *Myers* [1965] A.C. 1001.
(12) *Subramaniam* v. *Public Prosecutor* [1956] 1 W.L.R. 965, 970; [1956] M.L.J. 220.
(13) *Ratten* v. *The Queen* [1971] 3 All E.R. 801, 805.
(14) *R.* v. *Buckley* 13 Cox C.C. 293.
(15) *R.* v. *MacIntosh* [1968] Qd. R. 570.
(16) *R.* v. *Taylor* (1961) 3 S.A.L.R. 616.
(17) *O'Leary* v. *R.* (1946) 73 C.L.R. 566.
(18) *Teper* v. *R.* [1952] 2 All E.R. 447.

CRIMINAL TRIAL.

Balia Yusof bin Wahi, (Deputy Public Prosecutor) for the Public Prosecutor.

Darshan Singh for the lst accused.

R. Rajasingam for the 2nd accused.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: These two accused persons were prosecuted before me upon the following charge:

"That you on 18/4/1981 at about 4.30 p.m. at house No. 8 Medan Goh Guan Hoe, in the District of Georgetown, in the State of Penang, did traffic in dangerous drug, to wit, 420.7 grammes of heroin on your own behalf and you thereby contravened the paragraph (a) of sub-section (1) of section 39B of the *Dangerous Drugs Act, 1952*, and punishable under sub-section 2 of the same section of the said Act and read with section 34 of the *Penal Code*."

According to the prosecution, on April 15, 1981, Senior Customs Officer, Liew Chuan Siew (P.W.1) and Senior Superintendent of Customs, Mohamed Saad Haji Mat (P.W.3), received a telephone call from an informer, code-named No. 817, as a result of which they contacted him the same afternoon at the Peking Restaurant at the Esplanade, Penang. There, they met not only informer 817 but another informer code-named No. 822. The informer told them that there would be a transaction involving about eight pounds of heroin and added that they would contact P.W.1 and P.W.3 from time to time. They mentioned their intended roles in the impending transaction, namely; that one of them would pose as a buyer while the other would pretend to be his employee and driver. As a result of that meeting, they expected the informers to get in touch with them again.

They did not have long to wait for on April 18, 1981 in the morning, P.W.1 received a telephone call from one of them (he could not recall which) following which both he and P.W.3 proceeded immediately to the Peking Restaurant. There, they met the informers again and had a discussion with them. They were told that the transaction would take place that day between 1.00 and 1.30 p.m. at the Springtide Hotel, Tanjong Bungah, adding that they would arrive at the appointed venue in a Mazda car AAK 3908 accompanied by a male Chinese named Tan Gong Wai (the first accused) with whom they would discuss the proposed transaction.

As a result, later that day, at about 12.30 p.m., P.W.1 led a party of Customs Officers, 138, 2442, 3877 (P.W.7) to the Springtide Restaurant at Tanjong Tokong all proceeding in his car, PN 6877, and arriving there at about 12.45 p.m. and taking up their positions in the restaurant.

At about 1.03 p.m., a Mazda car, AAK 3908, pulled up at Springtide Restaurant. Three male Chinese alighted from it, one of whom was Tan Gong Wai, the first accused, the other two being the informers. All three were observed to proceed to a table facing the sea where they sat and chatted for about 15 minutes after which they got up and left, driving off in the same Mazda, but just before this, one of the informers waved his hand behind him, indicating to P.W.1. that he should remain at the restaurant. P.W.1 did so, and, fifteen minutes later, he received a telephone call from one of the informers, saying that he and his party were having lunch at the Pulau Tikus area and suggesting that P.W.1 should take his party to the junction of Scotland Close and Jalan Scotland as the Mazda would be making its appearance there and that P.W.1 should follow it.

As a result, P.W.1 took his party of Customs Officers to the junction of Scotland Close and Jalan Scotland where he and his men waited in the car PN 6877. It was now about 2.00 p.m.

Half an hour later, the Mazda car was seen passing by and heading towards Jalan Western when suddenly it stopped and made a U-turn and proceeded in the direction of Green Lane. P.W.1 then followed in his car. The Mazda then turned into Ayer Itam Road and eventually stopped outside a house, No. 8, Medan Goh Guan Hoe ("the house"). P.W.1 stopped his car, about 30 yards away at Taman Race Course, and alighted. He observed that the same three male Chinese alighted from the Mazda and walked into the house. He then instructed Customs Officers 138 and 3877 to wait in his car while he and Customs Officer 2442 hid themselves behind another car which was parked in front of the junction of Taman Race Course and Medan Goh Guan Hoe. From this vantage point, 30 yards away from the house, he was able to observe anyone going into or leaving it.

At about 3.30 p.m. he saw one of the informers, either 817 or 812, and the first accused, emerge from the house and drive off in the Mazda with one of the informers at the wheel and the first accused seated next to him. At about 3.45 p.m., the other informer emerged from the house, walked towards Taman Race Course and beckoned P.W.1 with a wave of the hand. On seeing this, P.W.1 stood up and went up to him. He told P.W.1 that the Mazda would come back later with "the stuff", meaning "the heroin".

As a result of what he was told, P.W.1 returned to his ambush position, where he waited until 4.30 p.m. when he saw the Mazda return to the house and stop there followed by a motorcycle. This time three male Chinese were seen to alight from the Mazda. They were: the first accused, the other informer and a third man carrying a black plastic bag. That man, according to P.W.1 was none other than the second accused who was a total stranger to him. Similarly, the motor-cyclist identified as Tay Liang Boo (P.W.2) who pulled up behind the Mazda was also a total stranger to him. The three male Chinese who alighted from the car, followed by P.W.2, were seen to enter the house. P.W.1 immediately instructed C.O. 2442 to position himself at the back of the house and stand guard there to make sure no one escaped while he instructed the other officers, 138 and 3877, to follow him. P.W.1 then rushed into the house but, just before this, when he had reached the main entrance door, he shouted "Customs".

On entering the hall, he found four male Chinese standing there. They were the two accused persons, the motor-cyclist (P.W.2) and the other informer. At this point, P.W.1 alleged that he saw the second accused throw away a black plastic bag. He also alleged that all these four persons tried to rush out of the house but he managed to detain three of them. They were the first and the second accused persons and P.W.2. The fourth man – the other informer – was stopped at the car porch by C.O. 3877.

P.W.1 said he then picked up the plastic bag from the floor in the hall which he identified as P2. On examining its contents he found in it, two packages wrapped up in newspapers.

One of these two packages contained a sealed plastic packet which in turn contained a light brown granular substance which he suspected to be heroin.

The other package contained two sealed plastic packets which in turn also contained a light brown granular substance which he suspected to be heroin. The three sealed plastic packets, with their contents, which constituted the subject-matter of the charge were marked, respectively, P4A, B and C.

The other persons in the hall then were two Chinese ladies, both occupants of the house, namely, Madam Ong (P.W.9) and her daughter Jennie Goh (not called though made available to the defence.) There were also a number of children present.

P.W.1 then proceeded to caution the two accused and to question them regarding Exhibits P4A, B and C. However, after conducting a trial-within-a-trial the prosecution failed to satisfy me that the caution administered was in accordance with the statutory form prescribed under section 37(a) of the *Dangerous Drugs Act, 1952* (Revised 1980) (Act 234) (the Act). I accordingly ruled that the replies by the accused to all questions put by P.W.1 were inadmissible.

However, questions put by P.W.1 to those present were admissible and I shall refer to these now. P.W.1 asked Jennie Goh, one of the two Chinese ladies, to whom P4A, B and C belonged. He also asked them from where the two packages came. Similar questions were put to P.W.2 who was also asked if he was the owner of the two packages. There was also evidence that P.W.1 asked the first and the second accused about the ownership of P2 and its contents. Later, the same day, the two accused, the informer and the two ladies, together with the offending exhibits, were taken to the Customs Office, Penang.

P.W.1's evidence regarding the meetings with the informers at the Peking Restaurant, the subsequent events at the Springtide Restaurant and later when the Mazda was trailed ending with the raid at the house was corroborated by the testimony of his men, namely, Customs Officers Ong See Oei (C.O. 2442) (P.W.5) and Yaakob bin Ariffin (C.O. 3877) (P.W.7). More particularly, his testimony that he saw the second accused carry the bag P2 and alight from the Mazda, which had stopped outside the house, was corroborated by C.O. 2442 (P.W.5).

Apart from this, there was also the evidence of P.W.2. This witness was at the date of the trial serving a sentence of two years' imprisonment for possession of heroin and although at first he adopted an attitude of non-involvement, so much so that the prosecution felt obliged to treat him as hostile and accordingly applied for and were granted leave to cross-examine him by reference to a previous statement he had made to P.W.3, namely, ID7, he was subsequently recalled, at his own behest, when he did a complete somersault by implicating both accused persons to the hilt.

What he eventually said was this: that ever since he was released from Customs custody following his detention in connection with the present case he was humiliated, threatened and assaulted by fellow prisoners who said that if he said anything against the two accused persons they would frame a case against his brother who is the sole breadwinner of the family by planting heroin in his car and they also threatened to throw acid at him. Before he came to this Court, while he was waiting to be called as a witness, he was warned by a person outside that they would hurt his brother. Two of the persons who threatened him were in Court listening to the evidence.

Having made the above statement he was asked by the learned Deputy what was it that the first accused came to see him about on April 18, 1981. He replied that the first accused had asked to be recommended as someone who had buyers for houses. The first accused, he said, had claimed he had a friend from Ipoh who was interested in buying houses. Secondly, he alleged that the first accused added that this friend was also quite interested in buying a little bit of drugs to take home.

He then said that although he was high when he made his cautioned statement (ID7) and simply answered questions put and simply signed it because the Customs wanted to release him, the contents of the statement were nevertheless true.

He was then taken through the ten individual passages in his cautioned statement and he then confirmed, that except for two passages, the rest of the passages underlined in red in ID7, were true. Specifically, the witness disclaimed three passages in ID7, namely, the second passage page 2 lines 10-16; third passage, namely, page 2 lines 17-20, about which he was not sure, and, lastly, the ninth passage, namely, page 6 lines 5-9, which he said were not true. I recognised that ID 7 (which should be numbered P7) is not substantive evidence, its sole purpose being to impeach P.W.2's credit under s. 155(c) of the Evidence Act, 1950.

I said in Open Court that I would give my ruling on the application by the prosecution to impeach P.W.2's credit after the conclusion of the case and I shall therefore make my findings on this and other matters touching P.W.2's credibility and reliability when I consider the whole of the evidence including that called by the defence.

To return to the subject of P.W.1's interrogation I did not overlook the fact that on entering

the house he did enquire from those present in the hall, including the first and second accused, as to the ownership of the black bag and its contents. According to P.W.9, he also asked from where the bag came. I did not regard this as being in any way inconsistent with P.W.1's evidence that he saw the second accused carry the bag into the house or that he saw the second accused later throw the bag onto the floor in the hall.

Ownership must be distinguished from possession. When P.W.1 enquired as to who owned the bag this did not amount to enquiring who brought the bag into the house. Similarly, the question from where the bag came, is not the same as asking who carried the bag into the house or who placed it on the floor in the hall. It is merely a question enquiring as to the origin of the bag.

At the close of the prosecution case I was satisfied that even without the evidence of statements made by the informers a *prima facie* case had been established against both accused persons which, if unrebutted, would warrant a conviction in accordance with the principles enunciated in *Haw Tua Tau* v. *Public Prosecutor*[1]. I accordingly called for the defence.

The defence of the first accused was to the effect that he had been for more than thirty years a tin smelting contractor with Eastern Smelting but had recently taken to being a broker in the housing field, and that on the morning of April 18, 1981, at about 10.00, a friend named Robert, whom he had known for seven years, had called on him enquiring if he could introduce anyone who was prepared to sell a dwelling house. The first accused then replied that he himself did not know anyone who wished to sell a house but that he knew of someone who might be able to help and this person was one Tay Liang Boo (P.W.2) who lived in the Pulau Tikus area. Robert then left saying he would return a little later.

On the same day, at about 11.00 a.m., he did return driving the Mazda car and accompanied by his boss. They invited the first accused into the car and drove off to the Springtide Restaurant for a chat regarding the sale of the house. They remained there for about fifteen minutes and during that time the first accused mentioned to Robert's boss that there was a broker who might be able to help in finding a willing seller and that he lived in the Pulau Tikus area. After that, they left for Pulau Tikus where they had lunch.

After lunch they went to P.W.2's house but, as he was not in, the first accused left a message with a member of the family saying that they would return at 3.00 p.m. at the same time mentioning the purpose of the visit. It was then 1.00 p.m. Robert's boss then suggested they go for a ride to Ayer Itam as it was still early. So, along they went heading towards Ayer Itam but, just after leaving Kampong Bharu, Robert's boss complained that he had a headache and needed a rest, so the first accused suggested that they stop at his friend's house, namely, No. 8, Medan Goh Guan Hoe (the accused) which was about half a mile away.

On arrival there, P.W.9 who was the mother-in-law of his friend who had since died, opened the door and the first accused told her that he had brought some friends who needed to rest for a while. They were duly admitted and there they had refreshments and talked about the prices of houses in the Medan Goh Guan Hoe area. At about 3.00 p.m. the first accused reminded Robert that the time was up for them to meet P.W.2, so they got up, but again Robert's boss complained of a head ache, and said he would remain in the house for a short while and suggested that Robert and the first accused should keep the appointment with P.W.2. Accordingly, the first accused and Robert returned to P.W.2's house in the Mazda leaving Robert's boss behind.

On arrival there, they found that again P.W.2 was not in but were informed that the message they earlier left had been conveyed to P.W.2 who had left for the first accused's house. So, the first accused and Robert drove off to 65-67 Dato Kramat where the first accused resided. The first accused alighted but Robert drove off saying that the first accused should wait for P.W.2 at a coffee stall nearby while he drove off to buy something for his boss and would return shortly.

While the first accused waited at the coffee stall, the second accused, whom the first accused had known for one year, emerged from the house. Apparently, the second accused used to visit there from time to time because a friend of his called Ah Hoe, a co-worker, also resided there.

On seeing the second accused, the first accused invited him for a drink at the stall and enquired why he was so free, whereupon the second accused replied that he had been out of employment and had come to look for Ah Hoe to find out if there was any job available. The second accused then

joined the first accused at the coffee stall. Not long after that, Robert arrived and, coincidentally, so did P.W.2 on his motorcycle. The first accused then told P.W.2 to follow the car and also suggested to the second accused that he should come along as he (the first accused) might possibly get him some repair work, the second accused being a carpenter by occupation. The second accused thought this was a good idea and so all three boarded the Mazda which drove off to the house followed closely by P.W.2 on a motorcycle.

On arrival there, the Mazda stopped, all three alighted, P.W.9 opened the door and, on entering the house, the first accused found that Robert's boss was not in. On enquiry, he was told by P.W.9 that Robert's boss had left. That being the case, the first accused felt that he too should leave. As he turned to leave, he saw Robert, the second accused and P.W.2 about to enter the outer gate of the house. At this point he saw Robert carrying a black bag and confirmed that this was the first time he had seen it and that it looked similar to P2. He saw all three, that is to say, Robert, the second accused and P.W.2 walked into the compound of the house. He said that as they turned to leave the compound, they heard the sound of footsteps running towards them and, at the same time, the shout "jangan lari".

He then saw Robert run back into the house followed by P.W.2 and the second accused who also ran. He was then pushed into the house by P.W.1 who was one of the group of men who charged into the house. P.W.1 was then armed with a hand-gun. In the hall, one of P.W.1's men handed a black bag to him, similar to P2. P.W.1 then enquired from him as to what the bag contained. Similar questions were addressed to the others but no one made any reply. Later, he and all the others in the house including the occupants were taken to the Customs Office, Penang, where they were detained.

That same night a cautioned statement was recorded from the first accused by P.W.3 through the interpretation of Wong Kam Choy (P.W.4) which the prosecution attempted to adduce in evidence but which, as I have said I rejected because I was not satisfied that the caution had been duly administered. I shall now give my reasons for that decision.

While it was true that P.W.3 affirmed that he did administer the caution through the interpretation of P.W.4, the latter when recalled, said that he acted as interpreter only during the second half of the interview. This meant that the caution which appears before the commencement of the statement could not have been interpreted by him. In view of the conflict of evidence between P.W.3 and P.W.4 on this point I was not satisfied that the caution had been duly administered and hence I ruled the statement taken from the accused at the Customs Office to be inadmissible.

I shall now evaluate the evidence of the first accused. There were two fundamental flaws in his defence. The first consisted of a failure to put to P.W.2 the question whether he had been informed on returning home on the afternoon of April 18, 1981 by members of his family of the message allegedly left by the first accused that he required the assistance of P.W.2 to find sellers of houses. The second was a failure to put to P.W.9 the question whether when the first accused called at her house accompanied by Robert and his boss, the first accused had mentioned that one of his friends was suffering from a headache and needed a rest. These two omissions gave rise to the inference that the defence of the first accused was a fabrication and a recent invention.

There were also other serious flaws in his defence; for example, he said that no particular house was under consideration for purchase that day, not even the area, though he claimed that he did ask Robert's boss what sort of house he had in mind. The reply he got was "as long as a house was ideal it could be any house." Neither did the first accused ask him, what price he was prepared to pay nor what type of house was required; for example, whether detached or semi-detached, single or double storey. He agreed that at the time there were many housing brokers in Penang but claimed that Robert wanted to help him make some money as they were known to each other for five to six years.

Then again the first accused admitted that when he first saw P.W.2 that day at his house he did not raise the subject about finding a house for sale claiming that he had no time to do so as Robert was in a hurry to fetch his boss. He merely told P.W.2 to follow him and the latter obligingly did so.

The first accused also admitted that he had never put through any sale of a house though he had effected two tenancy transactions, one in Kedah Road, another in Reservoir Road, but he did not know the addresses. Likewise his claim that

his meeting with the second accused as the latter left his house, was coincidental, I find totally unacceptable. So, also, the story that on finding that the second accused was in need of employment he suggested that the second accused should follow him because there might be a prospect of this. This I think is absurd since, at this point of time, there was no particular house under consideration. This being so, the first accused could hardly have any reason to suppose that there would be such prospect of work.

It seems to me fairly obvious that the meeting between the first and second accused was by design and not coincidental; similarly, the meeting with P.W.2.

I shall now evaluate the evidence of P.W.2, a summary of which I gave when discussing the case for the prosecution. It will be seen, therefore, that although in the final analysis P.W.2 denied that he saw the second accused carry the black bag into the house, or, for that matter, that he saw the second accused throw the black bag on the floor when the Customs Officers stormed into the house, he confirmed the rest of his statement as true. Clearly, this witness was, on his own showing, an accomplice and a person on whose evidence it would be dangerous to rely without corroboration because, not only was there a conflict between his oral evidence in Court and his cautioned statement, but his testimony in Court was also inconsistent if one compares the different versions he gave when he first gave evidence and later on, on recall, when he himself volunteered to make the statement in Court to which I have already referred.

I might add that I consider that the application for impeachment should be refused as the statement was not a voluntary one, having been recorded under oppressive conditions. P.W.2 was allowed no sleep or refreshments from the time he was brought into the Customs Office at 8.00 p.m. on April 18, 1981 until his cautioned statement was recorded from 5.15 a.m. to 7.20 a.m. on April 19, 1981.

I accept that part of the evidence of P.W.2 where he says that he was approached by the first accused on behalf of someone for drugs as the former was a known drug addict and could be expected to know about such sources and it was P.W.2 who enlisted the aid of the second accused for this purpose. I shall have more to say about this when discussing the case for the second accused but before proceeding to do so I wish to emphasize that I have warned myself about the danger of accepting the uncorroborated evidence of P.W.2 regarding this part of the case and, having warned myself, I am satisfied that the evidence of P.W.2 regarding this aspect of the case is true. P.W.2 and the first accused were on friendly terms. I cannot conceive that he would do such a vicious thing as to falsely implicate the first accused on a charge such as this. No reason was put by the defence to P.W.2 as to why he should do so. Indeed, if at all, P.W.2 when he first gave evidence had gone out of his way to shield and protect both the accused persons. No doubt he had been intimidated but later he volunteered to blow the lid off which opened the can of worms.

There is also the evidence of P.W.1 to which I have already adverted, namely, that on entering the house he saw the second accused throw the plastic bag, P2, and that like the second accused, the first accused attempted to escape from the house.

I now turn to consider the defence of the second accused. He claimed that he was a carpenter by occupation and that at the time was out of job for two to three days so he went to the house of his friend Ah Hoe where, coincidentally, the first accused also resided, to enquire if Ah Hoe's employer wished to engage a carpenter. However, Ah Hoe was not at home but he stayed for ten to fifteen minutes chatting with Ah Hoe's mother.

As he walked out of the house, he met the first accused who was seated at the coffee stall nearby. The first accused greeted him and invited him for a drink. He sat with the first accused and mentioned that he was out of employment. The first accused then replied that he was waiting for a friend who might be able to get him a job and suggested that the second accused should follow him and his friend.

A short while later, the first accused's friend arrived in the Mazda. The second accused claimed he was a total stranger to this person and that the three of them drove off in the Mazda, none of them carrying anything.

The first accused was seated next to the driver while the second accused was seated in the rear. At that moment, as the car was being reversed within the parking lot, P.W.2 appeared on the scene riding a motorcycle. The first accused then, with a wave of his hand, invited P.W.2 to follow him. P.W.2 did so.

Together they proceeded to Ayer Itam and, upon reaching the State Mosque, the motorcycle turned right and stopped in front of a house in Medan Goh Guan Hoe. The first accused alighted, followed by the driver and the second accused. At that moment, the second accused said that he saw P.W.2 arrive on his motorcycle. At this stage he noticed that the driver of the car was carrying a black bag similar to P2. He followed the driver into the house, although he was not asked. He clarified by saying that what he meant was that P.W.2 and he followed the driver into the compound of the house through the outer gate. At this stage he said that the first accused was at the entrance to the house and about to come out when he heard shouts "jangan lari" from behind. Then the driver ran into the house and he and P.W.2 followed them though they did not run but just walked. Just as he and P.W.2 were near the entrance to the house, Customs Officers arrived and detained them.

He denied that he discussed the drug deal with the first accused or that he carried the black plastic bag, P2. He maintained that the first time he saw the plastic bag was when it was in the hands of the driver on alighting from the car outside the house. He confirmed that he did not deal in, buy or sell drugs.

As regards the second accused, it is clear that once I believed the testimony of P.W.1 and C.O. Ong (P.W.5) that they saw him alight from the car when it stopped outside the house, carrying the bag (P2) and the subsequent evidence of P.W.1 that on entering the house, the second accused was seen to throw the bag onto the floor of the hall and attempt to escape from the house, the presumptions under section 37(d) and (da) of the Act came into operation and his mere denial, in the face of this evidence, could not possibly rebut the presumption having regard to the circumstances.

The story as to the chance meeting with the first accused I regarded as too much of a coincidence. Similarly, I regarded as false and untrue the story that he was led by the nose by the first accused to follow him merely on the possibility that he might be able to get a repair job on a mythical house which no one knew anything about.

The second accused claimed that he was a carpenter and, then, when questioned as to his occupation, first said he was a free-lance carpenter. Then he said he was a casual worker and gave a list of names of persons for whom he had worked. These names he said were nicknames. Later he explained that he did not wish to reveal their identities because they had been approached to be his witnesses but were reluctant to do so.

As regards Ah Hoe, this person could not be called because, according to his family, he had gone to Singapore and his whereabouts were unknown. Nor for that matter did he call Ah Hoe's mother with whom he claimed he had had a chat for ten to fifteen minutes on the morning of April 18, 1981.

It was suggested by the prosecution that earlier that morning before he went to Ah Hoe's house, which it will be recalled was also where the first accused resided, he was busy, not helping his mother in preparing hawker's food, but in finding drugs for the first accused. This was never really proved by the prosecution but the fact remains that the second accused was in possession of the drugs at the time and place mentioned in the charge and that he made no attempt to call his mother to confirm that he was assisting her.

I realise that no adverse inference against an accused person may be drawn by reason of his failure to call any witness or indeed to even give evidence on his own behalf for all he has to do is to raise a reasonable doubt: (*Goh Ah Yew* v. *Public Prosecutor*[2]). However, the failure to call any particular witness is a matter which the Court may take into account in assessing the weight of evidence (without drawing any adverse inference) especially so when the potential witnesses were persons in respect of whom the prosecution had probably no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence (*Regina* v. *Gallagher*[3]; *Public Prosecutor* v. *Lim Kuan Hock*[4]; *Tay Choo Wah* v. *Public Prosecutor*[5]).

As I have already said, the defence need not prove anything. All that they need do is to raise a reasonable doubt. As regards the first accused, criminal liability attaches to him by reason of the doctrine of common intention under section 34 of the *Penal Code*. There is evidence of his close association with the informers as deposed to by P.W.1, his visit to the Springtide Hotel, his subsequently being trailed to the house, the fact that it was he who induced the second accused and P.W.2 to go to the house, his being in the company of the second accused who carried the plastic bag containing the offending exhibits, his conduct when faced

with Customs Officers, namely, his attempts to escape and the transparent tissue of lies which he told in his defence regarding his attempts to find a buyer of a mythical house. I have already commented on the flaws in his defence including the failure of his counsel to put essential aspects of his defence to P.W.2 and P.W.9.

As regards the second accused I have already mentioned there was ocular evidence of manual possession on his part of P4A, B & C as deposed to by P.W.1 and by P.W.5.

This case illustrates the aphorism "Oh what a tangled web we weave when once we practice to deceive." Far from creating any reasonable doubt, the defence in this case merely served to confirm and to strengthen the case for the prosecution.

In the circumstances, I was satisfied that the charge had been proved against both accused beyond all reasonable doubt and I convicted them accordingly.

Before I consider passing sentence, I wish to mention that during the hearing the defence objected to the admission of statements made by the informers in this case to which I have adverted during the narrative of the prosecution case. I indicated then that I would give my ruling on this question after the conclusion of the whole case. I have accordingly dealt with this issue in a ruling which I annex hereto. I wish to add, however, that even without the impugned evidence I would still have convicted both accused persons having regard to the rest of the evidence in the case.

I now come to the question of sentence. The first accused was a first offender, aged 59 years, with ten children. It was submitted on his behalf that it was the informers who misled and caused him to commit the offence and, on this basis, it was said that I should show mercy and exercise my discretion in his favour by imposing a sentence of imprisonment for life.

As for the second accused, it was submitted on his behalf that he was 30 years old, unmarried, with a mother to support. It was said that the drug involved though hard was small in quantity, to wit, 420.7 grammes of heroin. It was also said that *agents provocateurs* were used and this led to the commission of this offence. Also, that as a result, temptation had been put in the way of destitute persons, that he too had a clean record and finally, that in 1981, the drug problem was not as serious as in 1982 or 1983.

I was satisfied that there were no extenuating circumstances to justify my showing mercy in the case of both accused persons: see *Chang Liang Sang & Ors.* v. *Public Prosecutor*[6].

The quantity of drug may not be large but was certainly not small. In any event, in my opinion, the quantity of drug can only be an element in assessing sentence but, by no means, a decisive consideration. Again, the use of *agents provocateurs* in cases such as this is not only not unlawful but specifically authorised under the Act. This is understandable in view of the notorious difficulty of getting evidence in such cases. It is also fallacious to say that at the time the offence was committed in this case the drug problem was not as serious as in 1982 or 1983: see *Public Prosecutor* v. *Oo Leng Swee*[7]; *Ong Ah Chuan* v. *Public Prosecutor*[8]. Also, I do not consider that the age of the accused persons in this case could be an extenuating circumstance nor for that matter that they may have dependants.

It is impossible to exaggerate the gravity of the offence of which the accused persons in this case were convicted. In this context, I need no more than reiterate what I said in *Public Prosecutor* v. *Lim Teik Seng & 2 Ors.*[9], namely,

> "It would be superfluous to emphasize that the drug problem in this country has now reached epidemic proportions and one of the only ways of checking it is to make it plain to all those concerned in the drug world that if and when a conviction is secured for an offence of trafficking in hard drugs, the Law will, in the absence of extenuating circumstances, be enforced with the utmost rigour. These remarks are now academic since in all trials for drug trafficking in the High Court in respect of offences committed on or after the coming into force of the recent amendments, once a conviction is secured, the Judge has no option but to pass the sentence of death."

It was for these reasons that I exercised my discretion by passing the sentence of death against both the accused persons.

Sentenced accordingly.

RULING ON ADMISSIBILITY OF STATEMENTS BY KNOWN INFORMERS NOT CALLED AT THE TRIAL TO BE WITNESSES FOR THE PROSECUTION

In this prosecution for trafficking in a dangerous drug in contravention of section 39(1)(B) of the

Dangerous Drugs Act, 1952 (Revised 1980) ("the Act"), the learned Deputy sought to introduce evidence of oral statements made to a witness by two informers code numbered 817 and 822, neither of whom was called to testify, which I reproduce hereunder and emphasise for the sake of clarity. The defence objected to this evidence on the ground that it contravened the Rule against the admission of hearsay evidence and, also, because it did not fall within any of the recognised exceptions thereto whose categories, as I said in *Kee Lik Tian* v. *Public Prosecutor*[10], citing *R.* v. *Myers*[11], are now closed.

Before I embark upon a consideration of the issue of admissibility of these statements I should mention that in exercise of my powers under section 425 of the Criminal Procedure Code I called evidence, after hearing final addresses, with a view to establishing whether or not the informers were in fact untraceable as alleged by the prosecution. I was satisfied that I had powers to do so, even at that late stage. Upon hearing such evidence, I was also satisfied that they were indeed untraceable.

The essential facts in the prosecution case relevant to the issue which arises appear sufficiently from my judgment on the general issue of whether guilt had been established by the prosecution.

The statements objected to may be treated as falling within the following compartments:

(1) the *telephone call Senior Customs Officer Mr. Liew (P.W.1) received from one of the informers on April 15, 1981 suggesting a meeting;*

(2) the consequent meeting in the afternoon of April 16, 1981 at the Peking Restaurant, Padang Esplanade, between the two informers, P.W.1 and P.W.3 at which the informers said *there would be a transaction involving heroin and mentioned the role they would play;*

(3) the telephone call P.W.1 received on the morning of April 18, 1981 from one of the informers *asking for an immediate meeting;*

(4) the consequent meeting at the Peking Restaurant very soon afterwards on the same day when *they informed P.W.1 and P.W.3 that the transaction would take place that day between 1.00 and 1.30 p.m. at the Springtide Hotel,* Tanjong Bungah, *and that the parties concerned would arrive in a Mazda car;*

(5) in consequence, P.W.1 led a party of Customs Officers to the Springtide Hotel arriving there at 12.45 p.m., when about eighteen minutes later, the Mazda car did arrive, the three persons, namely, the two informers and the first accused alighted, entered the Restaurant, sat at a table and engaged in conversation. About fifteen minutes later, they left but just before they did so, *one of the informers indicated to P.W.1 with the wave of his hand to stay behind;*

(6) the subsequent telephone call which P.W.1 received, from one of the informers, after a lapse of a further fifteen minutes, *suggesting that he take his party to the junction of Scotland Close and Jalan Scotland;*

(7) P.W.1's subsequent reaction in going to the junction, arriving there at 2 p.m. and, half-an-hour later, seeing the Mazda arrive which he followed to Medan Goh Guan Hoe;

(8) the statement made by one of the informers at Medan Goh Guan Hoe, after the Mazda had left at about 3.45 p.m., to P.W.1 *saying that the Mazda would come back later with "the stuff";*

(9) the return of the Mazda at about 4.30 p.m. with its occupants, namely, one of the informers, the first and second accused (seen carrying a black plastic bag) entering the house. The subsequent reaction of P.W.1 in leading the raid on the house ending in the recovery of the black bag which he had seen the second accused throw onto the floor of the hall.

I have set out the circumstances in which the statements were made by the informers to P.W.1 because I consider that the context in which those statements were made must be kept in the forefront of my mind for purposes of determining their relevancy and therefore their admissibility.

It is well settled that evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible where it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made (*per* Mr. L.M. de Silva in *Subramaniam* v. *Public Prosecutor*):[12].

The statements by the informers were relevant and admissible to show that, contrary to the evidence of the accused persons, the contemplated transaction at hand was not the sale and purchase

of a dwelling-house but the sale and purchase of drugs, to wit, heroin. "The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of a word is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on testimonially, *i.e.*, as establishing some fact narrated by the words." (*per* Lord Wilberforce in *Rattan* v. *The Queen*[13]). In my opinion, therefore, evidence of the statements made by the informers to P.W.1 was relevant and admissible *to rebut the defence of the accused persons.* It was not hearsay evidence but was admissible evidence of a relevant fact.

The statements by the informers were also relevant and admissible to explain the *reaction* of P.W.1 in acting on those statements in the manner he did, for example, in meeting them at the Peking Restaurant, later proceeding to the Springtide Hotel, to the junction of Scotland Close and Jalan Scotland, following the Mazda to Medan Goh Guan Hoe, and ultimately, in leading the raiding party to the house and there effecting the arrests: (*Subramaniam's case*).

The statements by the informers would be also relevant and admissible if they formed *part of the transaction leading up to the principal act,* namely, trafficking in drugs, which was the gist of the offence charged.

That they were antecedent transactions, and, as such, could not be a narrative of what happened is clear: see *Regina* v. *Buckley*[14]; *Regina* v. *McIntosh*[15]; *Regina* v. *Taylor*[16]. I recognised, that before such statements could be admitted, there must be shown a sequence of events leading up to the principal act.

It is therefore of importance to determine when a transaction begins and when it ends. It would, in my opinion, be wrong to confine the transaction in this case to the events at the house after the Customs Officers arrived for they could not be understood without regard to what went on before.

In *O'Leary* v. *Regina*[17] the question was whether evidence of assaults prior to a crime committed by the accused was properly admitted and Dixon, J. said:

> "Without evidence of what, during that time, was done by those men who took any significant part in the matter and especially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event."

Having regard to the circumstances under which the statements were made, it is my opinion, that they were sufficiently bound up with the principal act to show "what situation was occurring or developing at the time" (per Lord Wilberforce *ibid* p.806 para 2 in *Ratten* v. *Regina*[13]).

In particular, the statement by the informer outside the house to P.W.1 "that the car would be returning with the "stuff" was especially relevant and admissible as *throwing light upon what situation was occurring or developing at the time.* The truth of this statement was confirmed by ocular proof that "the stuff" was brought by the second accused in the Mazda car which returned one hour later to the house and its subsequent recovery and confirmation by the Chemist that it was in fact heroin.

Alternatively, if the statements concerned were hearsay, they were, in my opinion, admissible under section 6 of the Evidence Act 1950 as statements constituting part of the *res gestae.* Section 6 reads as follows:

> "Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places."

The first thing to note is that the section is inclusionary: relevant evidence which might otherwise have been excluded as merely going to prove propensity or as being hearsay, becomes admissible if it fulfils the condition precedent specified therein.

The next thing to note is that the section includes statements made not only at or about the time of the event in question but at different times and places.

I have already observed that the statements constituted a sequence of events leading up to the principal act, namely, trafficking in drugs, which was the gist of the offence. They were therefore sufficiently associated with the transaction of trafficking to be part of the *res gestae.*

As Lord Wilberforce said in *Ratten's case* (*supra*):

"The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received. The expression 'res gestae' may conveniently sum up these criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings."

Before concluding, I must mention that I did not overlook the case of *Teper* v. *R.*[18]. In that case, in a prosecution for arson with intent to defraud, a police constable testified that after hearing the fire alarm he heard a woman shout: "Your place burning and you going away from the fire" and immediately after, he saw a black car being driven away by a man resembling the accused. The words were spoken some 220 yards from the site of fire and about twenty six minutes after the fire started. The constable admitted that he did not know who or where the woman was. Their Lordships of the Board ruled that the woman's statement was inadmissible, and Lord Normand was careful to stress at page 450 para D "the special danger of allowing hearsay evidence for the purpose of identification requires that it shall only be allowed if it satisfies the strictest test of close association with the event in time, place and circumstances."

His Lordship amplified this when he said:

"There is yet another proposition which can be affirmed, viz., that for identification purposes in a criminal trial the event with which the words sought to be proved must be so connected as to form part of the res gestae is the commission of the crime itself – the throwing of the stone, the striking of the blow, the setting fire to the building, or whatever the criminal act may be. Counsel for the Crown submitted that any relevant event or action may be accompanied by words which may have to be proved in order to bring out its true significance. There is a limited sense in which this is true, but it is not always true, and much depends on the use to be made of the evidence. In *Christie's* case hearsay evidence of certain words uttered by a child, the victim of an indecent assault, in the presence and hearing of the accused were held to be admissible in explanation of the demeanour of the accused in response to them. But the evidence was held inadmissible for the purpose of showing that the child identified the accused as his assailant. In the present case identification is the purpose for which the hearsay was introduced, and its admission goes far beyond anything that has been authorised by any reported case." (p450 F-H).

Three points need to be stressed.

First, no question of identification is sought to be established by the statements of the informers in this case, so the rules as to contemporaneity of place, time and event ought not in my opinion to be applied strictly.

Second, it must be recognised that *Teper's case* is a leading authority for exclusion of statements expressive of any emotion such as surprise rather than assertion of any fact.

Third, it must also be recognised that s.6 deals with statements made not only at or about the time of the event in question but "at different times and places." This would suggest that the law in this country as to the admission of evidence as being part of the *res gestae* is less stringent than that in England.

I would sum up by saying first, that the statements were not hearsay and were admissible on four separate grounds:

(a) as evidence of fact relevant to an issue, *i.e.*, to rebut the defence of the accused persons;

(b) to explain the reaction of P.W.1 in acting on those statements in the manner he did;

(c) as part of the transaction leading up to the principal act, namely, trafficking in drugs, which was the gist of the offence charged;

(d) to throw light upon what situation was occurring or developing at the time;

second, and by way of alternative, if the statements were hearsay, they were admissible under

section 6 of the Evidence Act, as statements forming part of the *res gestae*.

For the foregoing reasons, I was satisfied that the statements were properly admitted.

Solicitors: *Darshan Singh & Co.; Rajasingam & Co.*

PUBLIC PROSECUTOR v. PENGURUS HONG TRADING & CO.

[R. Cr. J. (Eusoff Chin J.) March 17 & 18; April 4, 1984]

[Kuala Trengganu – Criminal Revision No. 1 of 1984]

Criminal Law and Procedure – Charge of an offence in contravention of s.11(1)(c) of the Sale of Food and Drugs Ordinance 1952 – Question of whether tea should contain no colouring matter whatsoever – Sale of Food and Drugs Ordinance, 1952, s.11(1)(c).

Interpretation – Ejusdem generis rule – Object of legislation – Sale of Food and Drugs Regulations, 1952, reg. 3(v)(ii).

In this case, the accused was charged as follows:- "That you on the 18th day of 1983 at about 11.00 at No. B-4, Tanah Lot, in the district of Marang in Trengganu, as a tea manufacturer did sell to one health Inspector Nik Mohd. bin Nik Abu Bakar 3 packets of tea known as 'sawi' brand which upon analysis were found containing Tetrazine and Ponceou 4R as facing matter and that you have thereby committed an offence under section 11(1)(c) of the Sale of Food and Drugs Ordinance 1952 and punishable under Section 11(4) of the same Ordinance".

At the trial, the manager of the defendant company in his defence said that the facing matters used by his company were those specifically allowed by law. On account of this defence, the Magsitrate acquitted and discharged the defendant.

The main issue in this case turned upon the interpretation of the words "or other matter for facing" found in regulation 3(v)(ii) of the Sale of Food and Drugs Regulations, 1952: "It shall not contain any spurious or exhausted or decayed or mouldy leaves or stalks or any Prussian blue or lead or any compounds of lead or other matter for facing or for any other purpose".

It was contended by the learned Deputy Public Prosecutor that the words "other matter" should be interpreted to mean that tea should not contain any facing matter whatsoever.

Held: (1) applying the *ejusdem generis* rule, the words "other matter" appearing in regulation 3 (v) (ii) of the Sale of Food and Drugs Regulations, 1952 should be restricted to any matter which is either harmful or deleterious to the human body. Regulation 18 Schedule A of the Regulations specifically allowed Tetrazine and Ponceou 4R to be used in tea as facing matter and accordingly, the defendant had not committed an offence;

(2) the law does not intend that no colouring matter whatsoever should be added to tea. If it is the intention of the law that tea should not contain any colouring matter, it should say so clearly;

(3) the order of the Magistrate that the defendant be acquitted and discharged should be confirmed.

Case referred to:-

(1) *In re Clark* [1898] 2 Q.B. 330.

CRIMINAL REVISION.

Mohamed Azman bin Hood (Deputy Public Prosecutor) for the Public Prosecutor.

Defendant in person.

Cur. Adv. Vult.

Eusoff Chin J.: The accused was charged under Section 11(1)(c) of the *Sale of Food and Drugs Ordinance* 1952 as follows –

"Bahawa kamu pada 18.5.1983, lebihkurang pukul 11.00 pagi, di kedai runcit Mustafa bin Embong, No. B-4, Tanah Lot, dalam daerah Marang, dalam negeri Terengganu, kamu sebagai pengilang, ada menjual kepada Inspektor Kesihatan Nik Mohd. bin Nik Abu Bakar, 3 bungkus Serbok Teh Cap Sawi yang selepas dianalisa didapati dibubuh bahan pewarna Tartrazine dan Ponceou 4R. Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 11(1)c Ordinan Jualan Makanan dan Dadah 1952 dan boleh dihukum di bawah seksyen 11(4) di bawah Ordinan yang sama."

It is the case for the prosecution that on May 8, 1980 at about 11.00 a.m. PW1 who was a health inspector of the Health Office Marang went to shop No. B-4 Tanah Lot, Marang. He bought three packets of tea – Teh Cap Sawi. From the tea packets, PW1 found that the manufacturer of the tea was Hong Trading & Co., the defendant. PW1 sent a sample of the tea to the Chemistry Department, K. Terengganu for analysis. The chemist report said that the tea contained Tetrazine and Ponceou 4R, as facing matters. The manager of the defendant company in his defence said that the facing matters used by his company are those specially allowed by law. The Magistrate acquitted and discharged the defendant.

In his argument before me the learned Deputy Public Prosecutor said that under regulation 3(v) of the Sale of Food and Drugs Regulations, 1952, (hereinafter referred to as the Regulations) tea should not contain "any Prussian blue, lead or any